No. 18,783

In the

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company, a corporation,
Appellant,

vs.

Alice Willene Williamson, a minor; John Brenkman, a minor; Carl E. Brenkman; C. W. Waddoups; Clara R. Waddoups; and Sara R. Murry, dba Rudolph Chevrolet,
Appellees.

Reply Brief of Appellant

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Lewis Roca Scoville Beauchamp & Linton
By John P. Frank
D. W. Grainger
900 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

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STATEMENT OF FACTS

This is a so-called sub-permittee case. Insureds, two adults, were insured by State Farm Mutual Automobile Insurance Co., appellants here. The insureds permitted the son of the family to use the car under close restrictions. Unquestionably, the insured never authorized the son to permit anyone else to use the car, indeed, appellants contend that this was positively forbidden. In any case, the son did permit a sub-permittee to use the vehicle. An accident resulted, and this action was filed to determine whether the policy covers accidents caused by such sub-permittee.

STATUTES INVOLVED

Arizona Revised Statutes Section 28-1142(D).

"Upon receipt of notice of the accident, the insurance company or surety company which issued the policy or bond shall furnish for filing with the superintendent a written notice that the policy or bond was not in effect at the time of the accident, if such was the case. If no such notice is received, the policy or bond shall be deemed to be in effect for the purposes of this chapter."

Arizona Revised Statutes Section 28-1170(G).

"A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section."

ARGUMENT

I. Implied Permission.

It has been conceded throughout that there was no direct permission to the sub-permittee. Appellant has contended that there is no evidence at all of implied permission, and appellee contends to the contrary, see appellant's brief, pp. 9-20 and appellee's brief, pp. 11-26.

(1) Purpose.

In our opening brief we said that the sub-permittee intended to use the car, "not for any purpose of concern to the named insured, but for the purely personal purpose of her own of getting an Arizona driver's license." We base this upon the following exchange (T. 63):

"Q. What is the purpose you had in asking or arranging with Ken to take his father's car?

"A. I wanted to get my Arizona driver's license at the license bureau.

"Q. Was that the only purpose you were to use the car for?

"A. Yes."

Appellee says that she had a dual purpose, intending to purchase gasoline for the automobile and also to pick up the son of the insured, the permittee, to take him home. We submit that to call this a "dual purpose" is a severe exaggeration. She was told to stop by a gas station "if she had time" (T. 104) and she was told "to be back when I got out of class" (T. 104). In other words she was told to return the car by a particular time. There is nothing in the case to show that she in fact ever went anywhere near the gas station or that this was an object of her trip and it can scarcely be a dual purpose to require that a vehicle be returned to its possessor. By her own testimony, the sole purpose was to perform a function for herself of no conceivable interest to the insureds.

(2) Alleged Disregard of Rules.

As we have shown in our opening brief, the insured were rather more than normally strict about the use of this car by their son. There were numerous rules concerning the use of the car, and, as we have shown, they were enforced. The appellee asserts of the son "that as a matter of practice he disregarded these rules", citing T. 21-22, 57-58 and 89.

These citations do not establish that "as a matter of practice he disregarded these rules." The first involves a direct statement by the father that the son did "generally obey these regulations." It is acknowledged that there were instances when he did not obey them; but he was repri-

manded and punished, as the father testified, for improper uses when they were discovered, "I took the car away from him from use for a period of time." (T. 23).

It is true that the son himself acknowledged that he violated instructions he was given (T. 89), but he also testified that he was thoroughly disciplined for any such abuses which his parents discovered. Specifically, the keys were taken away from him (T. 91). The best evidence of parental control is that at the time of the accident in question the boy was allowed to use the car only one morning a week, and that for the purpose of going to his classes (T. 44).

II. The Instruction.

This matter was covered in appellant's opening brief, pages 20-22, with reference to earlier discussion. It is answered by appellee at pages 26-30.

The entire case turns upon whether the insured had given the sub-permittee an implied permission to use the car. The appellant had asked for a definition of implied permission which would show that it depended upon "a course of conduct pursued with knowledge of the facts," including a requirement that it "signified clearly and convincingly an understanding consent which amounts in law to a grant of the privilege involved." The Court struck these knowledge elements of the instruction so that implied permission could be deduced from *either* the assent "*or* lack of objection" of the insured. The issue is therefore whether some express reference to knowledge must be made.

On this score, we cheerfully express the belief that we have the appellees laboring pretty badly. They concede that knowledge is a requisite of implied permission (appellee's brief p. 27) and then do their best to reason around

the fact that it was stricken by contending that in various ways it is still implied from what is left of the instruction.

On this point, since we are agreed in principle, argument is not useful. We merely ask the Court to look at the instruction denied and compare it with the instruction given. The instruction denied clearly and precisely and distinctly had the element of knowledge in it, and the instruction given did not. This is the error of which we complain.

As for the contention that we did not make this objection below, our short and only answer is that we did. (See T. 152-153).

III. The Financial Responsibility Act.

Appellees seek to make two uses of the financial responsibility statute and State Farm's failure to deny coverage thereunder. (1) They contend that the failure to deny coverage "creates a strong inference" that the sub-permittee was operating the automobile with permission of the named insured. (Appellee's brief pp. 18-19). (2) They contend that the failure to deny coverage makes a determination on the question of implied permission unnecessary because appellants are somehow made liable up to the policy amounts merely as a result of the failure to file a form. (Appellee's brief pp. 39-40). We shall reply to each of these contentions in turn.

1. The Inferences Created.

A. The failure to deny coverage certainly does nothing to create an implied permission. It occurred after the use of the car and the resulting accident in question.

B. A failure to deny coverage has no probative value as evidence of the existence of a prior grant of implied

permission. First, appellants were not called upon to deny coverage, but only to deny that a policy was still in effect—if it was not in effect. But it was. (For citations see below). Second, even if the company were called upon to deny coverage, failure to make that denial, in itself, creates many inferences other than that there was in fact implied permission. The failure may result from inadvertence, mistake, or a failure to respond to form letters. Further, the jury was told that the company intended to contest coverage from the first. Thus the sub-permittee testified that shortly after the accident she signed a paper saying that the company was not liable for her (T. 71). Her signed statement was a non-waiver form admitted as defendants' Exhibit A (T. 126).

2. Legal Effect of Failure to Deny Coverage.

A. Appellees contend (pp. 38-40 of their brief) that by virtue of the Financial Responsibility Act of Arizona, the plaintiff insurance company is liable here regardless of whether there was implied permission or not. This matter was not the basis of the decision below, and therefore had not been discussed in appellant's opening brief. *A.R.S. Sec. 28-1142(D)* provides that upon receipt of notice of an accident, the insurance company shall file with the Superintendent of Insurance "a written notice that policy or bond was not in effect at the time of the accident, if such was the case." It is stipulated that State Farm received such a notice here and that it filed no responsive written notice. From this the appellees seek in this Court to make some vast argument.

No one contends that the policy was not in effect at the time of the accident. The insureds were covered, and the policy was in effect. There had been no lapse, nor was

there any question of fraud in obtaining the policy, and these would seem to be the normal points of inquiry intended by the statute. The Arizona law does not provide, nor, so far as we know, does any other jurisdiction provide that an insurance company is barred from challenging the coverage of a remote user merely because it did not file a notice regarding effectiveness of the policy at the time of the accident.

Appellees, in their brief at page 39, assert that "It is apparent then that the Legislature intended that upon the failure of the insured to give notice contemplated by A.R.S. Sec. 28-1142(D), the coverage claimed is no longer subject to challenge." No authority is cited. There is none.

The precise problem is one of construing the statutory language which directs the company to report that a policy is not "in effect", if it is not. The question is whether this language has the consequence, if no report is filed, of barring the company from raising the very different issue, not of effect, but of coverage.

Financial responsibility acts exist in every jurisdiction in this nation. Acts substantially similar to Arizona's are commonplace. But there are two aspects of the Arizona statute, very relevant here, which distinguish the Arizona Act.

A.R.S. Sec. 28-1142(D) directs the insurance company *to deny* that a policy is in effect. In many other jurisdictions, the comparable form (SR 1A in Arizona; SR-21 elsewhere) *acknowledges* effect, or effect and coverage, when filed by the company. See e.g., *Seaford v. Nationwide Mutual Insurance Company,* 253 N.C. 719, 117 S.E. 2d 733 (1961); *State Farm Mutual Auto. Insurance Co. v. West,* 149 F.Supp. 289 (D. Md. 1957).

The second variation, and in this Arizona is unique, is that Arizona specifically provides a remedy. Thus, if a company fails to notify the Superintendent of Insurance that a given policy is not in effect, "the policy or bond shall be deemed to be in effect for the purposes of this chapter." *A.R.S. Sec. 28-1142(D).* These distinctions are essential to accurate comparison of the case at bar with cases from other jurisdictions.

Appellees' argument—that failure to give the notice contemplated by A.R.S. Sec. 28-1142(D) prevents challenges as to coverage—finds no support in any jurisdiction where the statutory scheme operates on a failure to file basis. In fact, many jurisdictions where statements affirming policy effectiveness are filed have held that an insurance company may later contest issues of effect and of coverage. So far as we have discovered, the effect of filing or of failure to file the appropriate financial responsibility form has been determined in a report of cases only in these jurisdictions:

(1) *North Carolina.* In *Seaford v. Nationwide Mutual Insurance Company,* 253 N.C. 719, 117 S.E.2d 733 (1961), the insurance company had filed a form stating that the policy was in effect but that it did not cover the particular driver. The text of the decision, which might have been limited to the disclaimer, goes much further and holds in effect that the statement has no relation at all to liability.

> "[T]he next question is whether or not the filing of the SR-21 form by the insurance company, as required by G.S. Sec. 20-279.19, waives its right to deny coverage under the terms of the policy. In other words, does the filing of an SR-21 form with the Department of Motor Vehicles prevent the defendant insurance company from subsequently raising the defense that the policy in question did not cover the plaintiff in the Maryland accident?

"The purpose of the SR-21 form, as required by G.S. Sec. 20-279.19, seems to be a means of protecting one's driving privilege by proving insurance in the minimum amount required by this State, and was not intended to be a contract. The required filing of the SR-21 form does not show an intent on the part of the Legislature that once the insurer files the form showing that the policy is in effect, such act affects the contractual rights of the parties, or precludes the insurance company from thereafter seeking to deny its liability under the policy.

"The plaintiff contends that the filing of the SR-21 form should have the effect of estopping the insurer from later denying coverage under the policy, and cites a Wisconsin case, Behringer v. State Farm Mutual Auto Ins. Co., 275 Wis. 586, 82 N.W. 2d 915, in support of his contention. As a result of the holding in the Behringer case, supra, the laws of Wisconsin were amended so as to change the holding of that case. Indeed, since the law has been changed in Wisconsin the Supreme Court of that State has allowed the insurance company to raise a defense subsequent to the filing of the SR-21 form. Kurz v. Collins, 6 Wis. 2d 538, 95 N.W.2d 365."

Seaford v. Nationwide Mutual Insurance Company, 253 N.E. 719, 117 S.E.2d 733 (1961) at p. 737.

(2) *Wisconsin.* Appellees have cited two cases of some relevance here. (Appellees' brief page 40). They are stated to be authority for the dual propositions (a) that the company is liable as a matter of law and (b) that such liability runs to the policy limits rather than merely to the statutory limits. These cases are *Behringer v. State Farm Mutual Auto. Insurance Co.,* 275 Wis. 576, 82 N.W.2d 915 (1957) and *Laughnan v. Aetna Casualty & Surety Company,* 1 Wis. 2d 113, 83 N.W.2d 747 (1957).

On the issue of the effect of nonfiling, these two Wisconsin cases are simply irrelevant for the very good reason that the company had in fact filed a statement admitting both that the policy was in effect and that there was coverage. Each is therefore a case of affirmative waiver.

In these Wisconsin cases, the company was denied the right later to repudiate its direct admission. As is pointed out in *Seaford,* quoted above, the Wisconsin legislature has since changed the statutory scheme. Subsequent to the change, the Wisconsin court, in *Kurz v. Collins,* 6 Wis.2d 538, 95 N.W.2d 365 (1959), cited *Behringer* and then went on to say:

> "It is, therefore, our considered judgment that the filing of the SR-21 by Badger does not bar it from relying upon its defense of breach of the cooperation condition of the policy." *Kurz v. Collins,* 95 N.W.2d 365 at 373.

But all this is unnecessary wisdom here, where there was no written concession in the first place.

(3) *California.* The California statute is similar to the Arizona statute in that it requires the insurer to notify the department when a policy is not in effect. Thus, it too raises questions based on failures to file. (See Cal. Vehicle Code Sec. 16060.)

Simmons v. Civil Service Employees Insurance Co., 369 P.2d 262, 19 Cal. Rptr. 662 (1962), (and we adjure the court to beware of possibly confusing head notes) holds that where no statement was filed,

> "Where no policy coverage had been extended the damages flowing from such violation could not be measured by reference to such a policy." *Simmons, supra,* 369 P.2d at 265.

(4) *Arizona.* The Arizona statute is a shade different from all others because it, uniquely, expressly provides a sanction for failure to file the statement. It provides

> "If no such notice is received, the policy or bond shall be deemed to be in effect for the purposes of this chapter." *A.R.S. Sec. 28-1142(D).*

The only case construing the Arizona statute is *Hardware Mutual Casualty Co. v. Barrett,* an unreported but extensive opinion, Civil No. 3239 Phoenix (September 30, 1961). This was a fraud in the inception case, and the first issue was whether the company, which had not filed, could deny that the policy was in effect. Judge Powell held in the negative, a decision which we think clearly correct in view of the Arizona addition. However, nothing in that opinion relates to the issue here, which is whether coverage is open to challenge.

Judge Powell's opinion also dealt with the question of whether the statutory limit or the policy limit was the measure of the insurance company's obligation. We return to that question below.

We conclude that no decision holds that failure to deny coverage, where it is admitted that the policy is in effect, binds the company on the issue of coverage. The California decision in *Simmons v. Civil Service Employees Insurance Co., supra,* seems expressly to hold that coverage is not conceded by a failure to file.

B. Appellees further contend that an insurance company is not only bound on the coverage question by its failure to file, but also that it is bound beyond the statutory limit and up to the policy limit. Again, the only authority cited is the Wisconsin cases, *Behringer* and *Laughnan,* discussed above. (Appellees' brief page 40). As has been explained above, the authority of these cases is undermined even in Wisconsin.

Further, on our reading, *Behringer* has nothing to do with the question of statutory limits versus policy limits. *Laughnan* does hold the insurance company to the policy limits. But the court bases this holding upon an affirmative statement by the company (a) that the policy was in effect and (b) that the particular driver was covered. *Laughnan v. Aetna Casualty and Surety Co.,* 1 Wis.2d 113, 83 N.W.2d 747, 755 (1957). The question raised by this part of the appellees' argument is really a part of a much broader question. We may state the broader question as follows:

Assuming that a provision of the Financial Responsibility Act makes an insurance company liable, where it would not be liable on the policy, then is the liability measured by statutory limits or by policy limits?

The following jurisdictions, in the following cases, are among those which have held that the liability is not measured by the policy limits:

New Hampshire:

Farm Bureau Automobile Insurance Company v. Martin, 97 N.H. 196, 84 Atl. 2d 823 (1951);

New Jersey:

Behaney v. Travellers Ins. Co., 121 F.2d 838 (3d Cir. 1941);

California:

Simmons v. Civil Service Employees Insurance Co., supra;

North Carolina:

Seaford v. Nationwide Mutual Insurance Company, supra;

Wisconsin: (In a case subsequent to the cases cited by appellees)

Kurz v. Collins, 6 Wis.2d 538, 95 N.W.2d 365 (1959).

The above is merely a representative listing. In Arizona the answer should be clear. First, there is the Arizona statute.

A.R.S. Section 28-1170(G) expressly provides that there may be coverage in excess of the amount provided for in the Financial Responsibility Law and then in terms provides, "the excess or additional coverage shall not be subject to the provisions of this chapter." It is of course only "this chapter" which gives the appellees any claim on this ground at all.

Second, Judge Powell's opinion in *Barrett, supra,* a case decided upon Arizona law, concludes the following:

> "The liability of the insurance company under the circumstances as found in this case, and under the statutes above quoted, is limited to the minimum security requirements of the Act. Nowhere does the Act specify in clear terms or by strong innuendo that the policy to the full amount of the coverage shall be in full force and effect. Instead, by its terms, it limits the liability to the minimum coverage requirements. *Farm Bureau Auto. Ins. Co. v. Martin,* 97 N.H. 196, 84 A.2d 823; *Landis for Use of Talley v. New Amsterdam Casualty Company,* 347 Ill. App. 560, 107 N.E.2d 187; *Behaney v. Travellers Ins. Co.,* 121 F.2d 838 (3d Cir.)."

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed.

Lewis Roca Scoville Beauchamp & Linton
By John P. Frank
D. W. Grainger
Attorneys for Appellant

October, 1963.

I certify, that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John P. Frank